ORIGINAL

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Amendment of Part 90 of the	)	
Commission's Rules and Regulations	)	
to Replace Section 90.655 End User	)	PR Docket 92-79
Licensing Requirements with an SMR	)	
Certification Procedure	)	

To: The Commission

REPLY COMMENTS

Respectfully submitted,

AMERICAN MOBILE TELECOMMUNICATIONS
ASSOCIATION, INC.

By: Alan R. Shark

Alan R. Shark, President
1835 K Street N.W., Suite 203
Washington, D.C. 20006

Of Counsel:

Elizabeth R. Sachs
Lukas, McGowan, Nace & Gutierrez
1819 H Street, N.W., Suite 700
Washington, D.C. 20006
(202) 857-3500

July 6, 1992

The American Mobile Telecommunications Association, Inc. ("AMTA" or "Association") respectfully submits its Reply Comments in the above-entitled proceeding.[1/] The Comments submitted in response to the FCC's proposal to replace its SMR end user licensing requirement with a system of SMR licensee certification support the FCC's initiative as a resource-conserving deregulatory measure. Some parties suggest certain refinements which will further enhance the Commission's objective and, thus, are supported by AMTA. A number of cellular industry members or representatives urge the FCC to transform this relatively modest proceeding into a vehicle for analyzing the regulatory distinction between private and common carriage, a suggestion which is both inappropriate and unnecessary.

All parties who provided substantive comments on the Commission's proposal concurred with AMTA in endorsing the substitution of an SMR certification program for the current, cumbersome end user licensing system.[2/] Each noted that the regulatory structure recommended would conserve valuable public and private resources without undermining the FCC's oversight capabilities. They recognized that the proposal appropriately

---

1/ Notice of Proposed Rule Making, PR Docket No. 92-79, FCC 92-172 (released May 5, 1992) ("Notice"). The Reply Comment date in this proceeding was extended to July 6, 1992 by Commission Order DA 92-854, dated June 25, 1992.

2/ See, Comments of the National Association of Business and Educational Radio, Inc. ("NABER"), Special Industrial Radio Service Association, Inc., and Council of Independent Communications Suppliers ("SIRSA/CICS"), American Petroleum Institute ("API"), E.F. Johnson Company, ("EFJ"), Fleet Call, Inc. ("Fleet Call") and Idaho Communications Limited Partnership ("ICLP") and RAM Mobile Data USA Limited Partnership ("RAM").

balances the FCC's obligation to promote full utilization of valuable spectrum by eligible users with its responsibility to do so in as streamlined fashion as possible. Several agreed that the system proposed was better suited to the present and future SMR market environment than the existing two-tier licensing structure. In addition, the Association believes that the following points raised in those comments warrant further consideration.

Both SIRSA/CICS and API suggested that the FCC's proposal might prompt less than responsible SMR operators to provide false information to the FCC regarding the number of units operating on their system. Those organizations recommended, therefore, that SMR loading reports be submitted under penalty of perjury, and that any provider of false information be prohibited from adding capacity at that site for a six month period. SIRSA/ CICS Comments at pp. 7-8; API Comments at pp. 7-8.

While AMTA does not believe that the regulatory scheme outlined in the Notice provides either a greater incentive or ability to misstate loading data than the existing structure does, it too wishes to ensure that only qualified licensees retain authorized channels or add capacity. For this reason, it supports the recommendation that loading information be provided under penalty of perjury.[3/] However, in AMTA's opinion the six

---

3/ If the Form 574 certification is not sufficient for this purpose, then it should be revised appropriately as should the FCC's short-form renewal and the Form 405A.

month penalty provision the parties would impose goes either too far or not far enough. The FCC should have maximum discretion in determining how to address an instance in which incorrect information was reported. No penalty should be imposed if the Commission determines that the error was inadvertent. If the mistake occurred in a request for renewal, and it was determined that there was insufficient loading to justify retention of all channels, the six month prohibition in Section 90.611(d) will apply automatically. If the error was made when seeking to expand, an arbitrary six month waiting period would unreasonably penalize both the SMR operator and the customers he serves.4/ On the other hand, if the information provided was determined to be knowingly false, AMTA would expect the FCC to take significantly more punitive action than imposing a six month ban on acquiring capacity at the site in question. The Association would urge the Commission to treat any such situation with the utmost seriousness, potentially involving substantial forfeitures and/or the loss of a system license(s).

In its Comments, AMTA expressed concern about the imposition on SMR licensees of responsibility for user actions or failure to act over which the SMR operator has no control and about which the licensee has no knowledge. AMTA Comments at pp. 5-8. That issue was the primary subject of the RAM and ICLP Comments. ICLP distinguished the SMR licensee's operational

---

4/ Since it could be some time before the application was considered, the mistake investigated and the situation resolved, the actual delay would be substantially longer than six months.

control over customer usage of the SMR facility from the licensee's control over individual customer actions. It noted that the FCC's proposal was not analogous to other regulatory situations vis-a-vis licensee responsibility in these areas. ICLP Comments at pp. 4-5. ICLP urged that the Commission's rules reflect this distinction by maintaining an individual end user licensing requirement for customers whose own facilities require FAA or NEPA clearance. AMTA would not object to such a requirement. Nonetheless, as expressed in its Comments, the Association remains convinced that SMR licensees should not be held responsible for any violation of FCC rules by its customers unless the SMR operator had knowledge of and an ability to prevent the violation.

One further aspect of the FCC's proposal requires reconsideration. Both AMTA and NABER recommended against reliance on a six month average to define system loading.5/ AMTA Comments at p. 10-12; NABER Comments at pp. 4-5. Both explained that utilization of a loading average, as opposed to the current "snapshot" approach, would unnecessarily delay the

---

5/ NABER also opposed AMTA's recommendation that units be able to be counted on all systems on which they operate. It instead urges retention of the requirement that an SMR licensee "report" those units which have been credited toward loading another system within the previous year. Since the requirement is only to report such usage, not to preclude it, it is not clear what standard NABER would establish. In AMTA's opinion, the inclusion for loading purposes of all units operating on a facility, even those which also operate on another system(s), accurately and responsibly reflects the industry trend toward multi-site capability, a fact which should be reflected in the FCC's rules.

availability of additional capacity for growing systems to the detriment of customers on those systems.

Finally, a number of individual cellular operators, as well as organizations which represent or regulate the cellular industry, wish to use this relatively modest, regulatory initiative to launch a wholescale challenge to the statutory and regulatory private versus common carrier delineation.[6/] These parties, for the most part, misstate both the rule changes proposed by the Commission and their ramifications.

First, the Commission is not proposing to abandon either SMR end user eligibility criteria or FCC oversight of that requirement. Joint Comments at p. 3. Whether that eligibility standard is reflected in individual end user licenses or in the SMR licensee's FCC certification is unquestionably a matter for agency discretion. Moreover, despite allegations to the contrary, SMR end user licensing is not a decisional factor in the statutory distinction between private and common carrier land mobile services. Joint Comments at p. 3; CTIA Comments at p. 3. That delineation has been determined by the FCC and approved by the courts to rest on the resale of telephone service

---

6/ See, Comments of GTE Mobilnet Incorporated and Contel Cellular, Inc. ("Joint Comments"), Cellular Telecommunications Industry Association ("CTIA"), National Association of Regulatory Utility Commissioners ("NARUC"), McCaw Cellular Communications, Inc., ("McCaw") and People of the State of California and the Public Utilities Commission of the State of California ("California").

and facilities for profit.[7/] The comments filed by McCaw and NARUC, in particular, make indisputably clear that their objections are belated attempts to reverse previous FCC decisions regarding various SMR regulatory requirements. McCaw Comments at pp. 3-7; NARUC Comments at pp. 4-7. These transparently untimely efforts to undo final Commission actions which have significantly advanced the SMR industry, and thereby the customers it serves, should be promptly and unequivocally denied.

The Commission's proposal to replace SMR end user licensing with an SMR licensee certification scheme warrants prompt and favorable FCC action consistent with the modifications proposed herein.

7/ See, e.g., Telocator Network of America v. FCC, 761 F.2d. 763 (D.C. Cir. 1985).

CERTIFICATE OF SERVICE

I, M.A. Spinks, a secretary in the law office of Lukas, McGowan, Nace & Gutierrez, hereby certify, that I have on this 6th day of July, 1992, placed copies of the foregoing **Reply Comments** in United States mail, postage prepaid, to the following:

Ralph Haller, Chief*
Private Radio Bureau
Federal Communications Commission
2025 M Street, N.W., Room 5002
Washington, D.C. 20554

Richard J. Shiben, Chief*
Land Mobile and Microwave Division
Private Radio Bureau
Federal Communications Commission
2025 M Street N.W., Room 5202
Washington, D.C. 20554

Rosalind K. Allen, Chief*
Rules Branch
Land Mobile and Microwave Division
Private Radio Bureau
Federal Communications Commission
2025 M Street N.W., Room 5202
Washington, D.C. 20554

Gary L. Stanford, Chief
Licensing Division
Private Radio Bureau
Federal Communications Commission
1270 Fairfield Road
Gettysburg, PA 17325

Terry L. Fishel, Chief
Land Mobile Branch
Licensing Division
Private Radio Bureau
Federal Communications Commission
1270 Fairfield Road
Gettysburg, PA 17325

Paul Rogers
National Association of Regulatory
Utility Commissioners
1102 ICC Building
P.O. Box 684
Washington, D.C. 20044

Ellen S. LeVine, Esq.
The People of the State of California
and the Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102

David E. Weisman, Esq.
National Association of Business
and Educational Radio, Inc.
4400 Jenifer Street N.W.
Suite 380
Washington, D.C. 20015

Robert S. Foosaner, Esq.
Fleet Call, Inc.
1450 G Street N.W.
Washington, D.C. 20005

Raymond J. Kimball, Esq.
Idaho Communications L.P.
888 Sixteenth Street N.W.
Washington, D.C. 20006

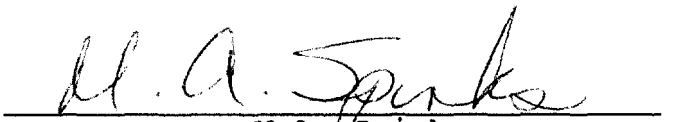
Mark E. Crosby
Special Industrial Radio
Service Association, Inc.
1110 North Glebe Road
Arlington, Virginia 22201

Wayne V. Black, Esq.
American Petroleum Institute
1001 G Street N.W.
Suite 500 West
Washington, D.C. 20001

Joan M. Griffin, Esq.
GTE Mobilnet Incorporated
and Contel Cellular Inc.
1850 M Street N.W.
Suite 1200
Washington, D.C. 20036

Michael Altschul
Cellular Telecommuniations Industry
Association
1133 21st Street N.W.
Suite 300
Washington, D.C. 20036

Henry Goldberg, Esq.
RAM Mobile Data USA Limited Partnership
1229 Nineteenth Street N.W.
Washington, D.C. 20036



M.A. Spinks

* By Hand Delivery